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Nos. 95-132, 95-378

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeals from the United States District Court for the Northern District of Ohio

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR TO AFFIRM

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THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

Appellants hereby submit this response to the Motions to Dismiss filed by Appellees both in case number 95-132 and in case number 95-378. There is a good deal of overlap between the issues in these cases, and consequently, Appellants submit a single response to the Motions to Dismiss in both cases.[1]

In their Motions to Dismiss, Appellees have failed to present the Court with any persuasive arguments that this appeal should either be dismissed or that this Court should affirm the rulings of the district court. Indeed,

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[1] For the Court's convenience, Appellants have listed the Questions Presented in both cases in the Appendix hereto.

Appellees' Motions to Dismiss further demonstrate that this Court should either summarily reverse the decisions of the district court or note probable jurisdiction and set the case for argument.[2]

The district court majority, in search of a rationale for its seemingly never-ending effort to invalidate Ohio's plan of apportionment for its General Assembly, has complicated this case by injecting a number of procedural and jurisdictional issues. The district court majority exceeded the scope of this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), and otherwise abused its discretion by permitting Appellees to amend their complaint following remand and to retry this case on a theory completely at odds with the theory upon which they originally tried the case. Then, the district court majority twice vacated its opinion and issued a new one.[3] On each occasion, the district court majority's actions required the participation of a judge who had resigned from office effective three days after the issuance of the April 28, 1995, opinion. Furthermore, the district court was without jurisdiction to vacate its May 26, 1995, decision because a proper appeal from that decision was pending in this Court.[4]

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[2] Much of Appellees' argument seems to suggest that this case is before the Court on a petition for a writ of certiorari. See Motion to Dismiss (95-132) at 7-8; Motion to Dismiss (95-378) at 12-13. It hardly needs emphasis, but in view of the tone of many of Appellees' assertions, Appellants note that this case is before the Court on appeal pursuant to 28 U.S.C. § 1253. Indeed, this is the only appeal available on a matter of great importance both to the people of the State of Ohio and to the proper relationship between federal and state authority.

[3] On May 26, 1995, the district court majority vacated its April 28, 1995, opinion and issued a new opinion. On August 11, 1995, the district court majority vacated its May 26, 1995, opinion and issued yet another opinion.

[4] Appellees suggest that Appellants inconsistently fail to assert that their notice of appeal from the district court's decision of April 28, 1995, deprived that court of jurisdiction to vacate that opinion and issue a new opinion on May 26, 1995. Motion to

Stripped of procedural and jurisdictional complexities, what is clear from its actions on remand from this Court is that the district court majority was searching for a reason, *any reason*, to usurp the authority of the Ohio Apportionment Board to draw districts for the Ohio General Assembly. The evidence before the district court unequivocally established that race was not the predominant factor motivating Appellants' adoption of the districts contained in Amendment D. Appellees simply could not establish that Appellants disregarded traditional districting principles or even that Appellants "gave race more weight than" other factors when drawing the plan. Thus, under any interpretation of this Court's decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), including the district court majority's erroneous interpretation of August 11, 1995, judgment should be entered for Appellants.

II. THIS COURT HAS JURISDICTION OVER APPELLANT'S APPEAL IN 95-132, AND THE DISTRICT COURT WAS WITHOUT JURISDICTION, THEREFORE, TO ENTER ITS ORDERS OF AUGUST 11, 1995.

Appellees have suggested that this Court lacks jurisdiction over Appellants' appeal in case number 95-132 because no judgment was entered in this case until August 11, 1995. This argument is without merit.

28 U.S.C. § 1253 provides:

> Except as provided by law, any party may appeal to the Supreme Court from *an order granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or

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Dismiss (95-378) at 15 n.8. Appellants have previously advised this Court, however, that the district court majority's May 26, 1995, decision and its order vacating its April 28, 1995, decision were filed some five hours *prior* to Appellants' notice of appeal, also filed on May 26, 1995. Jurisdictional Statement (95-378) at 7. Accordingly, no appeal was pending at the time the district court vacated its April 28, 1995, decision.

> proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(emphasis added). The district court's decisions of April 28, 1995, and May 26, 1995, directed Appellants to redraw eight Ohio House districts. App. (95-132) 39a ("Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles."); App. (95-132) 127a (same). Both decisions, therefore, constitute injunctions which were immediately appealable to this Court. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 306-09 (1975) (three-judge district court order that "directs" a party to take certain action is an injunction, and is, therefore, appealable to this Court pursuant to 28 U.S.C. § 1253). See also *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194-95 (1972); *White v. Regester*, 412 U.S. 755, 759-60 (1973). Accordingly, Appellees' assertion that Appellants' appeals from the April 28, 1995, and May 26, 1995, orders were premature is completely without merit.

Because Appellants properly invoked the appellate jurisdiction of this Court pursuant to 28 U.S.C. § 1253, the district court lacked jurisdiction to alter the status of this case before this Court, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985), as the district court purported to do in its orders of August 11, 1995.

III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS.

In their Motion to Dismiss or Affirm in case number 95-132, Appellees assert that, although none of them reside in four of the eight house districts declared invalid by the district court majority, they nevertheless have standing to challenge every district contained in Amendment D. In *United States v. Hays*, 115 S.Ct. 2431 (1995), however, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge the validity of those districts. 115 S.Ct. at 2436. This Court further ruled that residents of districts adjoining those alleged to have been racially gerrymandered do not have standing to attack an apportionment plan simply by alleging that the racial composition of the district in which they reside would have been different if the adjoining district had not been so gerrymandered. Nonresidents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." 115 S.Ct. at 2437.

Despite this Court's clear holding in *Hays*, Appellees assert that because some of them reside in four of the eight districts, they have standing to challenge the entire plan. This assertion is without any support in this Court's decision in *Hays*. Under Appellees' view of *Hays*, a plaintiff challenging the Hamilton County (Cincinnati) house district in which he resides would also have standing to challenge a Cuyahoga County (Cleveland) house district, even though that district is located at the opposite end of the state, more than 240 miles away. *Hays*, in which this Court denied standing to residents of adjoining districts, cannot be interpreted as suggested by Appellees.

Appellees, analogizing Apportionment Board members to legislators, further assert that they have standing to challenge the entire plan of apportionment because two of the Plaintiffs, Ferguson and Quilter, were the minority members of the Board which adopted the plan. This assertion is nonsensical.

This Court has concluded that legislators "whose votes . . . have been overridden and virtually held for naught . . ." may have standing to challenge official acts which have the effect of nullifying their votes. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). See also *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974) (A legislator alleging "an illegal nullification" of his vote has standing "to vindicate the effectiveness of his vote."). But neither this Court, nor any federal court, has ever held that a legislator in the minority has standing *as a legislator* to challenge legislative action by the majority. See *Leopold v. O'Leary*, 80 F.R.D. 99, 101 (D.Haw. 1978) ("A legislator has no special right to standing simply by virtue of that status.").

In the case at bar, Ferguson and Quilter allege no concrete injury as a result of the Apportionment Board's adoption of Amendment D. They do not reside in any of the challenged districts, and indeed, they no longer hold political office. Ferguson and Quilter's only asserted injury is that when Amendment D was adopted, they voted no.[5] Certainly, the mere casting of a dissenting vote is insufficient to confer standing upon a quasi-legislative official to challenge the action of the majority. *Korioth v. Brisco*, 523 F.2d 1271, 1278 (5th Cir. 1975) ("None of the cases has indicated that a legislator, simply by virtue of that status, has some special right to invoke judicial consideration of the validity of a statute passed over his objecting vote.") (footnote omitted). Conse-

[5] Under Appellees' view of standing, every bill passed by a federal state, or local legislative body would be subject to challenge by any legislator over whose dissenting vote the bill was passed.

quently, Appellees lacked standing to challenge four of the eight districts declared invalid by the district court majority.[6]

IV. THE DISTRICT COURT ERRED BY MISAPPLYING THIS COURT'S DECISION IN *MILLER v. JOHNSON*, AND BY CONCLUDING THAT RACE WAS THE PREDOMINANT MOTIVATING FACTOR IN THE DRAFTING OF DISTRICTS CONTAINED IN AMENDMENT D.

In their Motions to Dismiss or Affirm, Appellees urge this Court to affirm the district court majority's erroneous interpretation and application of this Court's decision in *Miller v. Johnson, supra.* Appellants submit that this Court's decision in *Miller* is clear and unambiguous; strict scrutiny is not required unless the plaintiffs establish that race was "the predominant factor motivating" the drawing of district lines. *Miller*, 115 S.Ct. at 2488. Plaintiffs cannot make this showing unless they prove that traditional districting principles were "subordinated . . . to racial considerations," 115 S.Ct. at 2488, *i.e.*, that state officials "relied on race in substantial disregard of customary and traditional districting practices." 115 at 2497 (O'Connor, J., concurring). In essence, Appellees invite this Court to reject its unambiguous holding in *Miller* and adopt a new standard.

Even if this Court were to accept Appellees' invitation and adopt the district court majority's new "more weight than" standard, it must conclude that on the evidence presented, the district court erroneously determined that race "was given more weight than" traditional districting

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[6] Appellees also asserted that Ferguson and Quilter have "*jus tertii* standing" to assert the rights of third parties who reside in the eight districts declared invalid by the district court. Ferguson and Quilter have not, however, suffered their own injury-in-fact and have no legal realtionship with those individuals whose rights they are purporting to assert. Accordingly, "*jus tertii* standing" is inapplicable. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

principles. Indeed, the very evidence cited by the district court unequivocally establishes that the Board did not give race more weight than other factors when it adopted Amendment D.

Tilling's handwritten notes confirm that race was *not* "the predominant motivating factor" in drawing the districts contained in *Amendment D*. As Tilling explained at trial, he created his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under his "model" plan, Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when Amendment D was adopted reducing the number of majority-minority districts to five, Tilling explained that the sole (and uncontradicted) reason for doing so was to comply with the provisions of Article XI of the Ohio Constitution.[7] Thus, the requirements of the Ohio Constitution were "given more weight than" race in drafting Amendment D.

Similarly, the Board's Findings and Conclusions establish that race was not given more weight than other factors in drafting a reapportionment plan for the Ohio General Assembly, but rather that race was considered as *a* factor.[8] When considered as a whole, they establish the

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[7] As explained by Tilling:

> That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.

D. 147, Ex. B at 87.

[8] Contrary to Appellees' assertion, the Board's Findings and Conclusions were not adopted pursuant to the district court majority's command to "show justification for its use of race in drawing districts . . . ." Motion to Dismiss (95-132) at 4-5; Motion to Dismiss (95-378) at 9. Rather, the Board's Findings and Conclu-

Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. D. 147, Ex. A, Findings at ¶¶ 32, 34, 241-54, Conclusions at ¶¶ 7-8, 11-12. See *Voinovich*, 113 S.Ct. at 1158.[9] Thus, it is plain that race was *not* the predominant factor in the Board's reapportionment, and contrary to the district court's holding, race was not given more weight than traditional districting principles.[10] This Court

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sions were adopted following the district court majority's command *to show justification for the creation of majority-minority districts rather than a greater number of influence districts as demanded by Appellees. Quilter v. Voinovich*, 794 F.Supp. 695, 701-02 (N.D.Ohio Jan. 31, 1992). It is for this reason that the Findings and Conclusions go into great detail explaining the drawing of district lines in all urban counties and the effect of those lines on concentrations of minority population. It is completely disingenuous for Appellees to assert that this detailed explanation, which they demanded, establishes that race was given more weight than traditional districting principles.

When viewed in their entirety, however, the Board's Findings and Conclusions establish that race was simply one of many factors considered by the Board. This is apparently the reason the district court majority originally adopted its "substantial and motivating factor" standard in its unrelenting quest to invalidate Ohio's reapportionment plan.

[9] Even the district court acknowledged that "[t]he Apportionment Board instructed Tilling to 'draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act,' and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act." App. (95-132) 28a (citations omitted); App. (95-132) 111a (citations omitted); App. (95-378) 29a.

[10] The district court majority also cites as evidence of racial gerrymandering the following increases in black voting age population in districts then represented by incumbent African-American legislators: (1) HD 21, +7.50%; (2) HD 22, +6.18%; (3) HD 30, +2.78%; (4) HD 31, +3.26%; (5) HD 38, +2.30%; (6) HD 39, +4.59%; (7) HD 44, +7.67%; and (8) HD 49, +8.29%. App. (95-378) 31a-35a. Appellants maintain that these minor increases in African-American voting age population do not support a finding

should, therefore, note probable jurisdiction and reverse the decision of the district court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statements in case numbers 95-132 and 95-378, filed on July 24, 1995, and September 8, 1995, respectively, this Court should either:

(a) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the Court's opinion and mandate in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); or

(b) note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted,

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that race was "the predominant motivating factor" in drawing the districts contained in Amendment D.

APPENDIX

APPENDIX

QUESTIONS PRESENTED

95-132:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

3. Was the district court's judgment erroneous (a) because it applied an incorrect standard of proof in determining that plaintiffs had made out a *prima facie* case and (b) because plaintiffs could not make out a *prima facie* case under the correct standard of proof?

4. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

5. Did the district court err in considering the question whether defendants' actions violated the Ohio Constitution because (a) consideration of that question was barred by the full faith and credit statute, 28 U.S.C. § 1738, and (b) if consideration was not barred by that statute, the district court should have abstained under the principles laid down by this Court?

95-378:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to

file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Was the district court divested of jurisdiction in this case once a proper notice of appeal was filed and perfected by the filing of a jurisdictional statement with this Court?

3. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

4. Did the district court err by (a) ruling that a plaintiff may establish a *prima facie* case of racial gerrymandering without establishing that the state redistricting officials relied on race in substantial disregard of customary and traditional districting principles, and if not, (b) by ruling that, on the evidence before it, the defendants had given less weight to traditional districting principles than to racial considerations?

5. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?